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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

Arizona Corporation Commission

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IN THE MATTER OF THE NOTICE OF
PROPOSED RULEMAKING FOR THE
ENVIRONMENTAL PORTFOLIO
STANDARD.

DOCKET NO. E-000006-00-0377

APPLICATION FOR REHEARING OF
DECISION NO. 63364

Pursuant to A.R.S. § 40-253, Phelps Dodge Corporation, ASARCO, Incorporated and Arizonans for Electric Choice and Competition (collectively referred to herein as "AECC") hereby submit this Application for Rehearing of Decision No. 63364 (the "Decision"). The Decision adopted the Environmental Portfolio Standard Rules ("EPS Rules") which mandate a portfolio requirement. In support of this Application, AECC incorporates herein by reference its Exceptions To Recommended Opinion And Order dated January 26, 2001, and states as follows:

1. The Decision fails to confirm that the EPS Rules do not allow for deferred costs to be recovered by Load-Serving Entities. AECC, along with other parties, reached an understanding that the EPS surcharge set forth in the revised EPS Rules was intended to meet all costs and that ratepayers would not be responsible for any deferred costs in the event the surcharge was not sufficient to recover the mandated renewable percentages. AECC's understanding is consistent with R14-2-1618.B.2 which provides that "in no event, however, shall the Commission increase the surcharge caps as delineated in R14-2-1618.A.2 above." Any attempt to interpret the EPS Rules as allowing the recovery of deferred costs would be

1 inconsistent with the understanding of the AECC and other parties to this proceeding and the
2 EPS Rules.

3 2. The Decision fails to clarify that the EPS surcharge is capped at the specified
4 amounts set forth in the EPS Rules.

5 3. The Decision incorrectly concludes that none of the proposed modifications to the
6 EPS Rules were substantive in nature. If the Commission believes that the EPS Rules allow Load-
7 Serving Entities to recover deferred costs from ratepayers, this is a substantive change which
8 required the Commission to terminate the proceedings and commence a new rule making
9 proceeding for the EPS Rules.

10 4. The Commission exceeded its authority in adopting the EPS Rules. The
11 Commission has no clear authority to promulgate rules mandating the source of electricity
12 furnished by Utility Distribution Companies ("UDCs") and Electric Service Providers ("ESPs").
13 It is well established that the powers of the Commission do not exceed those derived from a strict
14 reading of the Constitution and implementing statutes. See, e.g., Southern Pacific Co. v. Arizona
15 Corp. Commission, 98 Ariz. 339, 345 (1965). Equally clear is the fact that the Commission has
16 no implied powers. Id.

17 Article 15, section 3 of the Arizona Constitution grants the Commission the power to
18 make reasonable rules and regulations by which a public service corporation is governed.
19 Arizona courts have long held that the Commission's powers granted by article 15, section 3 of
20 the Arizona Constitution, are limited to prescribing just and reasonable classifications, rates and
21 charges of public service corporations. Corporation Commission v. Pacific Greyhound Lines, 54
22 Ariz. 159, 176-77 (1939). The Commission's attempt to regulate the source of electricity does
23 not fall within the Commission's power over rates and charges. In addition, the legislature may
24 delegate authority to the Commission upon such terms and limitations as it thinks proper. Id. at
25 177. Although the legislature possibly has the authority to delegate to the Commission the
26 power to regulate the source of electricity furnished by ESPs and UDCs, it has not chosen to

1 enact any such statute.

2 Additionally, the Commission's regulation of the source of the energy furnished by ESPs
3 and UDCs impermissibly interferes with the management of the ESP or UDC. Nowhere in the
4 Constitution or in Title 40 is the Commission given jurisdiction, directly or by implication, to
5 control the internal affairs of corporations. See Corporation Commission v. Consolidated Stage
6 Company, 63 Ariz. 257, 261 (1945).

7 The tension between the Commission's responsibility to require that public utilities be
8 operated in the public interest, and the public service corporation's responsibility to operate for
9 the benefit of its stockholders, was addressed in Southern Pacific Co. v. Arizona Corp.
10 Commission, 98 Ariz. 339 (1965). Concerning the Commission's power to regulate the
11 frequency of service of a railroad, the Court stated, "[i]t cannot be doubted but that a public
12 utility may, in the first instance, in the exercise of its managerial functions, determine the type
13 and extent of service to the public within the limits or adequacy and reasonableness." Id. at 343.
14 Despite the Arizona Supreme Court's flat rejection of the notion that the Commission may
15 regulate the type and extent of service, the ESP Rules do just that.

16 In sum, the Commission lacks the authority to adopt rules governing the source of
17 electricity. Pursuant to well established case law, the Commission may only regulate rates,
18 charges, classifications and those areas clearly delegated by the legislature. The legislature has
19 not chosen to delegate authority to regulate the source of electricity furnished by an ESP or
20 UDC. Furthermore, the Decision invades the management of the ESPs and UDCs.

21 5. The Commission's approval of an Environmental Portfolio Standard Surcharge,
22 and the filing of tariffs including such surcharge, will result in increased costs to Arizona
23 consumers. As with rates, the surcharge cannot be increased to cover the costs of the Renewable
24 Portfolio Standard without a rate proceeding. Rates and charges cannot be raised without a
25 hearing before the Commission. See Scates v. Arizona Corporation Commission, 118 Ariz. 531
26 (App. 1978); A.R.S. § 40-250.

1 For the foregoing reasons, AECC requests that the Commission grant rehearing of Decision
2 No. 63364.

3 RESPECTFULLY SUBMITTED this 28th day of February, 2001.

4 FENNEMORE CRAIG, P.C.

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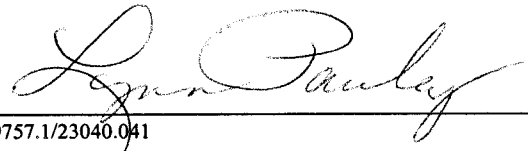
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